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MICHAEL RODAK, JR., CLERK

No. 77-1755

In the Supreme Court of the United States

OCTOBER TERM, 1978

PAUL W. MERCER and FLORENCE L. MERCER, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT*

**MEMORANDUM FOR THE RESPONDENT
IN OPPOSITION**

WADE H. MCCREE, JR.,
*Solicitor General,
Department of Justice,
Washington, D.C. 20530.*

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Petitioners seek review of the Tax Court's order denying them leave to amend their petition to contest the Commissioner's determination of a federal income tax deficiency for 1971.

The Commissioner properly mailed separate statutory notices of deficiency for 1971 and 1972 to petitioners on April 13, 1976 (R. 54-55, 67-81).¹ On July 8, 1976, petitioners joined several other persons in filing a petition in the Tax Court contesting the Commissioner's determinations only with respect to 1972 (R. 1-3). On September 27, 1976, petitioners sought to enlarge their petition to encompass a challenge to the Commissioner's determination for 1971 as well (R. 31-34). Since petitioners did not seek to enlarge their petition within 90 days of the mailing of the notice of deficiency for 1971,

¹"R." refers to the duplicated record in the court of appeals.

the Tax Court held that it lacked jurisdiction to redetermine the deficiency for 1971 (R. 86-87). The court of appeals affirmed (Pet. A1-A6).

Petitioners argue (Pet. 11-13) that they never received the notice of deficiency for 1971 and that the 90-day period for filing a Tax Court petition prescribed by Section 6213 of the Internal Revenue Code of 1954 did not begin to run until they received actual notice on September 6, 1976, that a deficiency for that year had been determined against them. They accordingly concluded that their attempt to amend their petition to include 1971 was therefore timely. But the courts have uniformly held that actual notice of a tax deficiency need not be received before the 90-day period within which a petition in the Tax Court may be filed begins to run. See, e.g., *Lewin v. Commissioner*, 569 F. 2d 444 (C.A. 7), certiorari denied, June 19, 1978 (No. 77-1452); *Berger v. Commissioner*, 404 F. 2d 668, 672 (C.A. 3), certiorari denied, 395 U.S. 905; *DeWelles v. Commissioner*, 378 F. 2d 37, 39 (C.A. 9), certiorari denied, 389 U.S. 996; *Brown v. Lethert*, 360 F. 2d 560, 562 (C.A. 8); *Luhring v. Glotzbach*, 304 F. 2d 556, 558 (C.A. 4); *Pfeffer v. Commissioner*, 272 F. 2d 383, 384 (C.A. 2); *Williams v. United States*, 264 F. 2d 227, 228-229 (C.A. 6), certiorari denied, 361 U.S. 862. Indeed, Section 6213(a) of the 1954 Code specifically provides that the petition must be filed within 90 days "after the notice of deficiency authorized in section 6212 is mailed" (emphasis added). Moreover, petitioners do not dispute the correctness of the Tax Court's finding that the notice of deficiency in question was properly mailed to them.²

²Section 6212(a) of the 1954 Code (26 U.S.C.) authorizes the Commissioner to send the notice of deficiency to a taxpayer by certified or registered mail, and Section 6212(b)(1) provides that the notice of deficiency shall be sufficient if mailed to the taxpayer at his

Petitioners further argue (Pet. 16-19) that the Tax Court's refusal to entertain their claim for 1972 deprived them of their right to due process. But the courts have consistently rejected the contention that the statutory requirement that a Tax Court petition be filed within 90 days after the notice of deficiency is mailed violates due process. See, e.g., *Lewin v. Commissioner*, *supra*, 569 F. 2d at 445; *Cohen v. Commissioner*, *supra*, 297 F. 2d at 772; *Brown v. Lethert*, *supra*, 360 F. 2d at 562; *Drake v. Commissioner*, 554 F. 2d 736, 739 (C.A. 5). See also *Berger v. Commissioner*, *supra*, 404 F. 2d at 674. A proceeding in the Tax Court is an alternative, not an exclusive, means of challenging the Commissioner's deficiency determinations. A taxpayer may also contest a determination by paying the tax and bringing an action for refund in the appropriate district court or of the Court of Claims. Such refund suit procedures fully satisfy the requirements of due process. *Flora v. United States*, 357 U.S. 63, 75; *Phillips v. Commissioner*, 283 U.S. 589, 595-599; *Cheatham v. United States*, 92 U.S. 85, 88-89.³

last known address. As the Ninth Circuit pointed out in *Boren v. Riddell*, 241 F. 2d 670, 672:

*** the purpose of using registered [or certified] mail is *first*, to provide the safest economical method of insuring that in the greater majority of cases, notice is actually received by the taxpayer from his Government; *second*, to create some commonly accepted factual basis to permit, in good conscience, the initiation of the ninety day period against the taxpayer, without requiring the Government to face the almost impossible task of *proving* actual notice to the taxpayer.

Accord, *Cohen v. United States*, 297 F. 2d 760, 772 (C.A. 9), certiorari denied, 369 U.S. 865.

³Contrary to petitioners' assertion (Pet. 14-15), the Commissioner has not taken inconsistent positions in this case. The Commissioner's motion to dismiss certain unidentified parties (John Does 1-5 and Jane Does 1-5) from the Tax Court proceeding (R. 22-25) was based

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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Solicitor General.

AUGUST 1978.

upon the fact that no notices of deficiency had been sent to such parties. Without the issuance of a notice of deficiency, the Tax Court lacks jurisdiction. See *Laing v. United States*, 423 U.S. 161, 165 n. 4.